FEDERAL MARITIME COMMISSION

ODYSSEA STEVEDORING OF PUERTO RICO, INC. *v.* PUERTO RICO PORTS AUTHORITY; INTERNATIONAL SHIPPING AGENCY, INC. *v.* PUERTO RICO PORTS AUTHORITY; SAN ANTONIO MARITIME CORPORATION *v.* PUERTO RICO PORTS AUTHORITY.	Docket Nos. 02-08; 04-01; 04-06

Served: November 30, 2006

The Puerto Rico Ports Authority is found not to be an arm of the Commonwealth, and is therefore not entitled to sovereign immunity from the regulatory adjudication of privately-filed complaints before the Federal Maritime Commission.

BY THE COMMISSION: Steven R. BLUST, *Chairman*, A. Paul ANDERSON and Rebecca F. DYE, *Commissioners*, announcing the decision of the Commission with respect to Part I, II, III A-C and IV; with A. Paul ANDERSON, Joseph E. BRENNAN, and Harold J. CREEL, Jr., *Commissioners*,

delivering the opinion of the Commission with respect to Part III-D; A. Paul ANDERSON filed a concurring opinion with respect to Part III-D; Steven R. BLUST and Rebecca F. DYE dissenting with respect to Part III-D; and Joseph E. BRENNAN and Harold J. CREEL filed a dissenting opinion.

ORDER

These proceedings were initiated by complaints filed against Puerto Rico Ports Authority ("PRPA") by Odyssea Stevedoring of Puerto Rico, Inc. ("Odyssea"), International Shipping Agency, Inc. ("Intership"), and San Antonio Maritime Corp. and Antilles Cement Corp. (collectively "SAM").[1] Complainants allege that PRPA's marine terminal leasing practices violate sections 10(b)(10), 10(d)(1), 10(d)(3), and 10(d)(4) of the Shipping Act of 1984 ("Shipping Act" or "Act"), 46 U.S.C. §§ 41102 and 41106. Further, Intership alleges that PRPA violated section 10(a)(3) of the Act, 46 U.S.C. § 41102(b), by failing to act in accordance with the terms of an agreement filed with the Federal Maritime Commission ("Commission").[2] The cases are now before the Commission for a determination of whether PRPA is entitled to sovereign immunity. For the reasons set forth below, the Commission has determined that PRPA has failed to meet its burden to show that it is entitled to sovereign immunity as an arm of the Commonwealth. These cases are therefore

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[1] These proceedings have not been consolidated. However, for the purpose of judicial economy, these cases have been treated in a similar manner for the purpose of determining whether PRPA is entitled to sovereign immunity as an arm of the Commonwealth of Puerto Rico.

[2] The citations herein reflect the recent codification of Title 46, Pub. L. No. 109-304 (2006).

remanded to the Administrative Law Judge for further proceedings consistent with this Order.

I. BACKGROUND

A. Case Status

1. Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority, Docket No. 02-08

Odyssea is a marine terminal operator involved in the business of providing stevedore and marine terminal operator services to common carriers engaged in U.S. domestic and foreign commerce at facilities in the Port of San Juan, Puerto Rico.

Odyssea filed a complaint against PRPA on May 31, 2002, claiming several violations of the Shipping Act and seeking reparations, a cease and desist order, and other relief as the Commission may deem appropriate. On December 24, 2003, PRPA filed a Motion for Summary Judgment arguing, in part, that sovereign immunity bars the adjudication of Odyssea's complaint. On September 15, 2004, the presiding Administrative Law Judge ("ALJ") issued an oral ruling denying PRPA's motion, and denying its request for a stay pending appeal to the Commission. The oral ruling was followed by a written ruling to the same effect issued on November 9, 2004. On September 16, 2004 the Commission issued an order staying the proceeding in order to permit the Commission to review whether PRPA is entitled to sovereign immunity.

2. International Shipping Agency, Inc. v. Puerto Rico Ports Authority, Docket No. 04-01

Intership is a marine terminal operator involved in the business of providing stevedore and marine terminal operator services to ocean common carriers engaged in U.S. domestic and foreign commerce at several berthing facilities in the Port of San Juan, Puerto Rico.

Intership filed a complaint against PRPA on December 29, 2003, claiming several violations of the Shipping Act and seeking reparations and other appropriate relief. On March 5, 2004, PRPA filed a Motion to Dismiss, in part, on the basis of sovereign immunity. On September 17, 2004, the ALJ denied PRPA's motion and ordered it to respond to the complaint. On September 21, 2004, the Commission issued an order staying the proceeding in order to review the issue of whether PRPA is entitled to sovereign immunity.

3. San Antonio Maritime Corp. and Antilles Cement Corp. v. Puerto Rico Ports Authority, Docket No. 04-06

SAM is a marine terminal operator engaged in the development of land and dock facilities and the administration of vessels and berthing facilities in the Port of San Juan, Puerto Rico. SAM's operations and facilities are dedicated to the receiving, handling, storing, packing and distribution of cement and related materials.

SAM filed a complaint against PRPA on April 21, 2004, claiming several violations of the Shipping Act and

seeking reparations, a cease and desist order, and other appropriate relief. On June 16, 2004, PRPA filed a Motion to Dismiss, in part, on the basis of sovereign immunity. On September 27, 2004, the ALJ referred the issue of PRPA's sovereign immunity to the Commission.

B. Respondent - Puerto Rico Ports Authority

PRPA is a public corporation and government instrumentality of the Commonwealth of Puerto Rico. It is a marine terminal operator that owns and controls marine terminal facilities at the Port of San Juan, Puerto Rico, including facilities at: Puerto Nuevo, Puerto de Tierra, Isla Grande, and the Army Terminal. PRPA is involved in the business of furnishing terminal facilities and services to ocean common carriers operating in U.S. domestic and foreign commerce. PRPA leases facilities to other marine terminal operators, such as Odyssea, Intership and SAM.

PRPA filed dispositive motions in all three cases arguing that the complaints were barred by PRPA's sovereign immunity as an arm of the Commonwealth of Puerto Rico. PRPA's motions argue that the Commonwealth of Puerto Rico is entitled to sovereign immunity, that the Shipping Act does not abrogate that immunity, and that PRPA is an arm of the Commonwealth of Puerto Rico entitled to share in the Commonwealth's sovereign immunity. All three Complainants opposed PRPA's claim of sovereign immunity.

C. Commission Proceedings

On November 22, 2004, the Commission issued an Order in all three cases requesting briefing on the issue of whether the Commonwealth of Puerto Rico should be treated

as a state for the purpose of constitutional sovereign immunity in light of the origin and purposes of such immunity ("Order"). The Complainants filed a joint petition for reconsideration of the November 22nd Order on December 20, 2004. On December 22, 2004, the Commission denied the joint petition, but granted their request to extend the briefing schedule. All of the parties filed opening briefs on January 7, 2005 and reply briefs on February 15, 2005. The Commonwealth of Puerto Rico filed an amicus curiae brief on January 7, 2005. In its February 15, 2005 reply memorandum, Odyssea requested that the Commission issue an order to show cause directing PRPA and the Commonwealth to explain why Trans-Caribbean Maritime Corp. v. Commonwealth of Puerto Rico, 2002 PR App. Lexis 595 (March 27, 2002) is not controlling in this proceeding. On March 2, 2005, PRPA filed an Opposition to Odyssea's Petition to Show Cause, and on March 9, 2005, the Commonwealth filed a Response to Odyssea's Request for an Order to Show Cause. Intership filed a Motion to Strike on March 17, 2005, to which PRPA and the Commonwealth filed pleadings in opposition

The Commonwealth of Puerto Rico petitioned the Commission for leave to file a brief as amicus curiae on January 7, 2005 in response to the Commission's November 22 Order. The Commonwealth's petition for leave is granted. In its amicus brief, the Commonwealth argues that although it should be treated as if it were a state for the purposes of sovereign immunity, it is unnecessary to reach the constitutional question since the Puerto Rico Federal Relations Act establishes a default rule that requires application of the laws of the United States to the Commonwealth with the same force and effect as in the states.

On October 17, 2006, the Commission held oral argument in all three proceedings on the specific question of whether PRPA is an arm of the Commonwealth.

II. SUMMARY OF PRPA'S ENABLING STATUTE

The Commission finds that PRPA's enabling statute establishes the following:

1. Puerto Rico Ports Authority is a public corporation and government instrumentality of the Commonwealth of Puerto Rico. See 23 L.P.R.A. §§ 331-352.

2. PRPA was created with a legal existence and personality separate and apart from those of the Commonwealth of Puerto Rico and any officials thereof. See 23 L.P.R.A. § 331(b).

3. The debts, obligations, contracts, bonds, notes, debentures, receipts, expenditures, accounts, funds, undertakings and properties of the Authority, its officers, agents or employees, have been deemed to be those of PRPA, and not those of the Commonwealth of Puerto Rico, or any office, bureau, department, commission, dependency, municipality, branch, agent, officials, or employees thereof. See 23 L.P.R.A. § 333.

4. The purpose of PRPA is to develop and improve, own, operate, and manage any and all types of marine transportation facilities and services in, to and from the Commonwealth of Puerto Rico. See 23 L.P.R.A. § 336.

5. PRPA has complete control and supervision of any undertaking constructed by it or acquired by it including the power to determine the character of and necessity for all expenditures and the manner in which they shall be incurred, allowed and paid without regard to the provisions of any laws governing the expenditure of public funds, and such determination shall be final and conclusive upon all officers of the Commonwealth of Puerto Rico. See 23 L.P.R.A. § 336(d).

6. PRPA has the power to sue and be sued. See 23 L.P.R.A. § 336(e).

7. PRPA has the power to acquire by purchase, by the exercise of eminent domain, or by any other lawful means, equipment, supplies, services, goods, and such other property real and personal as PRPA deems necessary in connection with its activities. PRPA is further empowered to lease as lessor or exchange any such property or interest therein. See 23 L.P.R.A. § 336(h-j).

8. Upon request of the Authority, the Governor of Puerto Rico or the Secretary of the Department of Transportation and Public Works shall have the power to purchase in the name or on behalf of the Commonwealth of Puerto Rico any property, title or interest that PRPA deems necessary and convenient, either by agreement or by the exercise of the right to eminent domain. In either case, PRPA is obligated to reimburse the Commonwealth for the cost of obtaining such property. See 23 L.P.R.A. § 339.

9. PRPA has the power to determine, fix, alter, impose and collect rates, fees, rents and other charges for the use of the facilities or services of PRPA. See 23 L.P.R.A. § 336(l)(1).

10. PRPA has the power to borrow money, make and issue bonds of PRPA for any of its corporate purposes or for the purpose of financing, refinancing, paying or discharging any of the outstanding or assumed bonds or obligations and to secure payment of such bonds. See 23 L.P.R.A. §§ 331(n)-(o).

11. Bonds and other obligations issued by PRPA are not a debt of the Commonwealth of Puerto Rico or any of its municipalities or other political subdivisions, and neither the Commonwealth nor any political subdivisions shall be liable for such obligations. See 23 L.P.R.A. § 345.

12. The legislature has provided certain minimal criteria for the rates, fees, rents and other charges imposed by PRPA. See 23 L.P.R.A. §§ 331(l)(1)(A)-(C).

13. PRPA has no power to pledge the credit or taxing power of the Commonwealth of Puerto Rico or any of its political subdivisions, nor can the Commonwealth of Puerto Rico or any of its political subdivisions be liable for the payment of the principal or interest on any bonds issued by the authority. See 23 L.P.R.A. § 336(u).

14. All monies of PRPA are deposited in qualified depositories for funds of the Government of the Commonwealth of Puerto Rico, but such funds are kept in a separate account, or accounts, registered in the name of PRPA. The disbursements are made by PRPA pursuant to regulations and budgets approved by the board. The Secretary of the Treasury, in consultation with PRPA, shall establish an accounting system for all expenses and income of PRPA; and the Controller of Puerto Rico shall examine the books and records of PRPA every three years and provide a report to the Board of Directors of PRPA, the Governor of Puerto Rico and the Legislature of Puerto Rico. See 23 L.P.R.A. § 338.

15. PRPA is obligated to submit to the Legislature and the Governor of Puerto Rico, on an annual basis, unless otherwise required, the following items: (1) a financial statement and complete report of the business of the Authority for the preceding fiscal year; and (2) a complete report on the status and progress of all of its undertakings and activities since the date of the last report. See 23 L.P.R.A. § 345.

16. PRPA is exempt from payment of taxes. PRPA is obligated to pay four hundred thousand dollars ($400,000) on an annual basis to the Commonwealth Treasury, when such funds are available after payment of operating and maintenance expenses, the principal of and interest on outstanding obligations and the reserves established by PRPA for such purposes. See 23 L.P.R.A. § 348.

III. DISCUSSION

The issue currently before the Commission is whether PRPA is entitled to sovereign immunity as an arm of the Commonwealth of Puerto Rico.

A. Arm of the State[3]

PRPA argues that it is entitled to sovereign immunity as an arm of the Commonwealth of Puerto Rico. If PRPA is found to be an arm of the Commonwealth, then PRPA would be entitled to share in any immunity enjoyed by the Commonwealth. PRPA is related to the Commonwealth. However, not every government-related entity is an arm of the state. For example, arm of the state status, or, in this case, status as an arm of the Commonwealth, does not extend to counties and similar municipal corporations. Mt. Healthy City School Bd. of Educ. v. Doyle, 429 U.S. 274, 280-281 (1977); Alden v. Maine, 527 U.S. 706, 756 (1999); Northern Ins. Co. of New York v. Chatham County, 126 S.Ct. 1689 (2006); Ceres Marine Terminals, Inc. v. Maryland Port Admin., 30 S.R.R. 358, 366 (2004). Accordingly, the Commission must determine whether PRPA is an arm of the Commonwealth.

It is PRPA's burden to demonstrate that it is an arm of the Commonwealth, not the Complainants' burden to prove that it is not. Gragg v. Ky Cabinet for Workforce Dev., 289 F.3d 958, 963 (6th Cir. 2002). As discussed more fully below,

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[3] The Commonwealth of Puerto Rico is not a state. However, in order to remain consistent with established legal precedent, the term "state" is used to refer to the concerns of the Commonwealth. This is not intended to elevate the Commonwealth to "state" status based on the application of a legal test to review sovereign immunity.

we find that PRPA has not met its burden of proof, and we find that PRPA is not an arm of the Commonwealth, and is therefore not entitled to immunity from the adjudication of privately-filed complaints before this Commission.

1. Applicable Standard

As discussed in Ceres Marine Terminals, Inc. v. Maryland Port Administration, 30 S.R.R. 358 (2004), the Commission's test to determine whether an entity is an arm of the state includes a review of the structure of the entity and the risk to the state treasury. In reviewing the structure of the entity, three factors are considered: 1) the degree of control that the state exercises over the entity at issue; 2) whether the entity deals with local or statewide concerns; and 3) the manner in which applicable law treats the entity. See Ceres, 30 S.R.R. at 368-69; Carolina Marine Handling, Inc. v. South Carolina State Ports Authority, et al., 30 S.R.R. 1017, 1029 (2006). This test takes into consideration recent Supreme Court case law that has modified the analysis used to determine whether an entity is an arm of the state. In Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743, 760 (2002), the Supreme Court altered traditional notions of determining arm of the state status through its pronouncement that state dignity, rather than risk to the state treasury, is the preeminent purpose of state sovereign immunity.

As noted in an earlier Commission order in these proceedings, the Commission cannot simply follow the law of the circuit in which an action arises since, as a federal agency, cases before it can arise in any jurisdiction and can be subject to appeal in a multitude of circuits. See Commission Order in Docket Nos. 02-08; 04-01; 04-06, November 22, 2004. The

standard employed by the Commission is consistent with the substance of the analysis used by the First Circuit. However, the First Circuit reviews the risk to the treasury only if the structural analysis is inconclusive. See Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico and the Caribbean Cardiovascular Center Corp., 322 F.3d 56, 68 (1st Cir. 2003).

2. PRPA's Status under the Applicable Standard

a. Structure

As noted, there are three questions that must be examined in reviewing the structure of an entity. These include the degree of control that the state (here, the Commonwealth) exercises over PRPA, whether PRPA deals with local or statewide concerns, and the manner in which the laws of Puerto Rico treat PRPA.

i. Degree of Control

The first step in reviewing the structure of PRPA is to determine the degree of control that the Commonwealth exercises over PRPA. We have relied on the Commonwealth statute which created PRPA to aid in our analysis of this factor. We have concluded that this enabling statute indicates that PRPA is not under the control of the Commonwealth. The following statutory provisions from PRPA's enabling act indicate the lack of Commonwealth control: (1) PRPA was created with a legal existence and personality separate and apart from those of the Commonwealth and any officials thereof, 23 L.P.R.A. § 331(b); (2) the debts, obligations, contracts, etc. of PRPA are deemed to be those of PRPA and

not those of the Commonwealth, 23 L.P.R.A. § 333; (3) the purpose of PRPA is to own, operate and manage transportation facilities, 23 L.P.R.A. § 336; (4) PRPA has complete control and supervision of its undertakings, including the power to determine the character and necessity for its expenditures, and such determinations are final and conclusive upon all officers of the Commonwealth of Puerto Rico, 23 L.P.R.A. § 336(d); (5) PRPA has the power to sue and be sued, 23 L.P.R.A. § 336(e); (6) PRPA has the power and authority to set rates, fees, rents and other charges for the use of its facilities, within established minimums set by the legislature, 23 L.P.R.A. § 331(1)(A)-(C); (7) PRPA has the power to borrow money and issue bonds, although such bonds and other obligations issued by PRPA are not a debt of the Commonwealth or any of its municipalities or other political subdivisions, nor is the Commonwealth or any of its political subdivisions liable for such obligations, 23 L.P.R.A. § 345; (8) PRPA cannot pledge the credit of the Commonwealth, and has not been given the taxing power of the Commonwealth, 23 L.P.R.A. § 331(u); and finally, (9) PRPA's accounts, although deposited in qualified depositories for funds of the Government of the Commonwealth, are to be kept separate and apart from the funds of the Commonwealth, are kept under the name of PRPA, and disbursements of such funds are made pursuant to the regulations and budgets approved by the Board of Directors of PRPA, 23 L.P.R.A. § 338. Finally, despite PRPA's argument to the contrary, PRPA does not have the authority to exercise eminent domain. While section 336(h) allows PRPA to obtain property through the exercise of eminent domain, section 339 provides that it is the Commonwealth that actually has the right to exercise the power of eminent domain, upon PRPA's request.

We note that there are several provisions of the enabling act which PRPA asserts demonstrate that the Commonwealth exercises some control over PRPA. However, in our evaluation, taken as a whole, PRPA's enabling statute establishes PRPA as an entity with substantial independence from the government of the Commonwealth. PRPA asserts that the following provisions indicate control: (1) the Board of Directors of PRPA is appointed by the Governor, 23 L.P.R.A. § 334; (2) the Controller of Puerto Rico is charged with auditing the books and records of PRPA every three years and providing a report to the Board of Directors of PRPA, the Governor and the Legislature of Puerto Rico, 23 L.P.R.A. § 338; (3) PRPA is exempt from payment of taxes, although it is required to pay an annual fee in the amount of $400,000, if it has sufficient annual net income, 23 L.P.R.A. §§ 348, 354; and finally, (4) the Commonwealth established PRPA for the public purpose of promoting "the general welfare, and the increase of commerce and prosperity," 23 L.P.R.A. § 348(a).

We find PRPA's assertions unpersuasive. The fact that the statute explicitly creates PRPA with a legal existence and personality separate and apart from that of the Government of the Commonwealth, with the power to sue and be sued, and with its funds kept separate and apart from those of the Commonwealth, among other provisions, demonstrates that the legislature did not intend for the Government of the Commonwealth to control PRPA.

A plain reading of the enabling act indicates that the Commonwealth does not exercise significant control over PRPA. Accordingly, this factor does not support finding that PRPA is an arm of the Commonwealth.

ii. Local vs. Statewide Concerns

The second step in the structural analysis is to consider whether PRPA deals with local or statewide concerns. PRPA notes that the Commission has previously found that terminal operations are an essential state function. See Ceres, 30 S.R.R. at 369. Further, PRPA's enabling statute entrusts PRPA to manage transportation in order to promote the general welfare, and to increase commerce and prosperity for the whole of Puerto Rico. See 23 L.P.R.A. § 336.

Accordingly, the Commission finds that PRPA deals with statewide concerns.

iii. PRPA's Treatment Under the Law of Puerto Rico

The final factor of the structural analysis is to consider the manner in which the law of the Commonwealth treats PRPA. We find that PRPA is not entitled to immunity pursuant to either statutory or case law. As indicated supra, PRPA's enabling statute created PRPA with sufficient autonomy so as to be separate and independent from the Commonwealth.

Both Commonwealth and federal courts have found that PRPA is not an arm of the Commonwealth. The Circuit Court of Appeals of Puerto Rico held that the Commonwealth is not answerable for complaints against PRPA when PRPA is exercising its proprietary rights as a marine terminal operator. Trans-Caribbean Maritime Corp. v. Commonwealth of Puerto Rico, 2002 PR App. Lexis 595 (March 27, 2002). In its original Motion to Dismiss in Trans-Caribbean Maritime, as well as in its writ of certiorari, the Commonwealth expressly

argued that PRPA is a separate legal entity, and that the Commonwealth should not be answerable for complaints against PRPA relating to breach of contract matters. Specifically, the Commonwealth argued that, due to the enabling act, "it is clear that [PRPA] is a separate legal entity independent of the Commonwealth with the authority to enter into contracts" and "therefore, the Commonwealth is not liable for the obligations entered into by PRPA." Appellant's Writ of Certiorari at 5, Trans-Caribbean Maritime Corp., 2002 PR App. Lexis 595 (KLCE2001) (2002).

There is also consistent history of federal courts finding that immunity does not extend to PRPA. In Canadian Transport Auth. v. Puerto Rico Ports Auth., 333 F.Supp. 1295 (D.C.P.R. 1971), the U.S. District Court for the District of Puerto Rico ruled that the Commonwealth's immunity does not extend to PRPA because: PRPA was a public corporation with a sufficient identity of its own; PRPA had the power to sue and be sued; and that PRPA, not the Commonwealth, was the real party in interest. The U.S. Court of Appeals for the First Circuit also ruled that PRPA is not entitled to immunity as an arm of the Commonwealth in Royal Caribbean Corp. v. Puerto Rico Ports Auth., 973 F.2d 8 (1st Cir. 1992). The Royal Caribbean Court found that "the Ports Authority is an entity that enjoys a considerable degree of autonomy, that it provides a service (maintaining and operating docking facilities) that it, in effect, 'sells' to users, and [that]. . . a judgment [is] likely to be paid from the Authority's funds, not from the Commonwealth's treasury." Id. at 12.

PRPA notes that the First Circuit held in favor of immunity in Puerto Rico Ports Auth. v. M/V Manhattan Prince, 897 F.2d 1 (1990). However, and as discussed by the First Circuit in Royal Caribbean, Manhattan Prince is

distinguished due to the type of activity at issue. Manhattan Prince found that PRPA enjoyed immunity when acting as a regulatory body. The Royal Caribbean Court found the distinction appropriate due to the primarily governmental function at issue in Manhattan Prince (regulating the licensing of pilots), compared with the commercial function of owning and operating marine terminal facilities. Royal Caribbean, 973 F.2d at 12. Moreover, the First Circuit has specifically reviewed this distinction in PRPA's role as a regulatory body and when operating as a marine terminal operator in Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Authority, 991 F.2d 935, 942 n.6 (1st Cir. 1993). In Metcalf & Eddy, the Court noted that:

> In Manhattan Prince, the Ports Authority [PRPA] was acting only as the licensor of harbor pilots for whom it provided no training and over whom it exercised no assignment power. The Authority derived no revenue from the licensing function. Moreover, the legislature had explicitly made Authority members' misfeasance of the kind alleged in Manhattan Prince attributable only to the Commonwealth. See P.R. Laws Ann. tit. 23, § 2303(b) (1987). [This] case is much different; [Puerto Rico Aqueduct and Sewer Authority] charges for its services, controls its total operations, and answers for its own bevues. Thus a more apt Ports Authority analogy is found in Royal Caribbean Corp. v. Puerto Rico Ports Authority, 973 F.2d 8 (1st Cir. 1992). That case involved not licensing, but the operation of the ports. See id. at 9. Because the Ports Authority charged user fees that supported the

> costs of its port operations and was relatively free of central government control, we ruled that [PRPA] did not enjoy Eleventh Amendment immunity with respect to its management of the ports. Id. at 12.

Metcalf & Eddy, Inc., 991 F.2d at 942 n.6.

Courts have also found that entities similar in structure to PRPA have not been entitled to share in the Commonwealth's immunity. See Riefkohl v. Alvarado, 749 F.Supp. 374, 375 (D.P.R. 1990) (Puerto Rico Electric Power Authority not immune, despite statute declaring it a "governmental instrumentality" with the purpose of "promot[ing] the general welfare and increas[ing] commerce and prosperity") and Paul N. Howard Co. v. Puerto Rico Aqueduct Sewer Auth., 744 F.2d 880, 886 (1st Cir. 1984) (government corporation established to provide drinking water and sewage facilities is not normally immune).

The First Circuit has most recently reviewed an entity very similar in structure to PRPA in Pastrana-Torres v. Corporacion De Puerto Rico Para La Difusion Publica, 460 F.3d 124 (1st Cir. 2006). Pastrana-Torres found that the Puerto Rico public broadcasting company, WIPR, enjoyed a significant degree of autonomy from the Commonwealth since: (1) it was structured as a public corporation with a juridical personality that is independent and separate from the Commonwealth; (2) its Board of Directors was empowered to approve, amend or repeal regulations necessary to fulfill its mission and may determine the use of its operating budget; (3) the Governor did not have veto authority over the Board of Directors; and (4) the enabling act empowered WIPR with the

right to sue and be sued, to enter contracts, to acquire and maintain property and to raise its own revenue. Id.

Significantly, the Pastrana-Torres Court found it uncontrolling that the Board of Directors was comprised of certain government officials, including a cabinet secretary and private citizens appointed by the Governor and confirmed by the Senate, or that the entity was required to submit reports to the Governor and the Legislature. Pastrana-Torres, 460 F.3d at 127-128. PRPA's enabling act contains provisions similar to each of the above. After balancing the factors in the enabling act, Pastrana-Torres evaluated the risk to the treasury. The Court ultimately found against the entity being an arm of the Commonwealth since the Commonwealth was not bound to pay WIPR's debts, even despite the fact that over 70% of its annual funding came from the Commonwealth. The connections between WIPR and the Commonwealth appear to be much closer than those between PRPA and the Commonwealth.

In sum, PRPA's enabling statute, as well as local and federal case law, overwhelmingly indicate that PRPA is not an arm of the Commonwealth. Our structural analysis, therefore, does not support a finding that PRPA is entitled to treatment as an arm of the Commonwealth.

b. Risk to the Treasury

The second prong of the arm of the state analysis requires examining whether the treasury of the Commonwealth is placed at risk by a judgment against PRPA. PRPA's enabling act indicates the legislature's intent to create PRPA as a fiscally autonomous public corporation, financially

independent from the Government. Several statutory provisions provide clear evidence of such intent:

> Section 333(b) of 23 L.P.R.A. provides:
> The debts, obligations, contracts, bonds, notes, debentures, receipts, expenditures, accounts, funds, undertakings, and properties of the Authority, its officers, agents or employees, shall be deemed to be those of said government controlled corporations, and not those of the Commonwealth of Puerto Rico, or any office, bureau, department, commission, dependency, municipality, branch, agent or employees thereof.
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> Section 336(u) of 23 L.P.R.A provides:
> The Authority shall have no power at any time or in any manner to pledge the credit or taxing power of the Commonwealth of Puerto Rico or any of its political subdivisions, nor shall the Commonwealth of Puerto Rico or any of its political subdivisions be liable for the payment of the principal or of the interest on any bonds issued by the Authority.
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> Section 338(a) of 23 L.P.R.A provides:
> All monies of the Authority shall be deposited in qualified depositories for funds of the Government of the Commonwealth of Puerto Rico, but they shall be kept in a separate account or accounts registered in the name of the Authority.
>
> Section 346 of 23 L.P.R.A provides:

> The bonds and other obligations issued by the Authority shall not be a debt of the Commonwealth of Puerto Rico or any of its municipalities or other political subdivisions, and neither the Commonwealth of Puerto Rico nor any such municipality or other political subdivisions shall be liable thereon, nor shall such bonds or other obligations be payable out of any funds other than those of the Authority.

Further, PRPA does not rely on Commonwealth financing for its operating budget. To the contrary, although PRPA does not pay taxes, it makes payments to the Commonwealth Treasury in the amount of $400,000 per year, which can be reduced if the annual net income of PRPA is insufficient to make payment in full. 23 L.P.R.A. § 354.

The First Circuit reviewed a similar situation in Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico and the Caribbean Cardiovascular Center Corp., 322 F.3d 56 (1st Cir. 2003). In Fresenius, the Court noted that:

> The control asserted by the state is an important guide to the initial inquiry. But where the evidence is that the state did not structure the entity to put the state treasury at risk of paying the judgment, then the fact that the state appoints the majority of the governing board of the agency does not itself lead to the conclusion that the entity is an arm of the state.

Id. at 68. As discussed supra, although the Governor appoints PRPA's board of directors, the Commonwealth has insulated its treasury from the debts and obligations of PRPA.

In its Motions for Summary Judgment and to Dismiss, PRPA acknowledged that its accounts are separate from the Commonwealth and that this fact weighs against finding a risk to the Commonwealth's treasury. PRPA's Motion for Summary Judgment in Dkt. No. 02-08 at 43; PRPA's Motion to Dismiss in Dkt. No. 04-01 at 11; and PRPA's Motion to Dismiss in Dkt. No. 04-06 at 4. However, at oral argument, PRPA argues, for the first time, that the real party in interest is the Commonwealth since its treasury is put at risk by the fault or negligence standards of 23 L.P.R.A. § 2303(b).

Section 2303, however, relates to damages arising under the Dock and Harbor Act of Puerto Rico of 1968. The Dock and Harbor Act charges PRPA with the performance of certain regulatory duties, e.g., licensing harbor pilots, as was at issue in Manhattan Prince. Section 2303(b) subjects the Commonwealth to liability for the fault or negligence of PRPA's administrator, or any officer, employee or agent of PRPA in the administration of the Dock and Harbor Act. However, section 2303(b) specifically exempts the Commonwealth from such liability when PRPA is acting as a marine terminal operator. The full text of 23 L.P.R.A. § 2303(b) provides:

> The damages caused through the action or omission of the Administrator or of any officer, employee or agent of the Authority, while acting in his official capacity and within the scope of his function, employment or commitment as an agent of the Government of the Commonwealth of Puerto Rico under the provisions of this chapter (in contraposition as when acting in the exercise of the property rights of the Authority as a public corporation) intervening fault or negligence,

> shall exclusively be requirable to the Commonwealth of Puerto Rico as provided by law.

In reviewing the distinction between PRPA acting "in the exercise of the property rights of the Authority as a public corporation" and when acting pursuant to the Dock and Harbor Act, the Court of Appeals of Puerto Rico stated that "beyond any doubt, . . . management of the operations of the ports form part of those 'proprietary rights' referred to in section 2303(b)." Trans-Caribbean Maritime, 2002 PR App. Lexis 595. Trans-Caribbean Maritime makes clear that PRPA's actions as a marine terminal operator do not subject the Commonwealth to liability under section 2303(b). Id. The First Circuit has also specifically reviewed this statutory provision and has also distinguished PRPA's role in licensing harbor pilots from that of operating ports. Metcalf & Eddy, 991 F.2d at 942 n.6; compare Royal Caribbean, 973 F.2d 8, with Manhattan Prince, 897 F.2d 1.

We find that there is a strong statutory basis to conclude that the treasury of the Commonwealth of Puerto Rico is not put at risk by a judgment against PRPA. PRPA's debts and obligations are not considered those of the Commonwealth; PRPA does not rely on the Commonwealth for its operating budget; PRPA maintains separate accounts from the Commonwealth, and there is no evidence that the Commonwealth has paid litigation claims and settlements on behalf of PRPA in the past. Accordingly, the above facts demonstrate that the treasury of the Commonwealth would not be placed at risk by a judgment against PRPA.

Our evaluation of all of the relevant factors supports a finding that PRPA is not an arm of the Commonwealth since: the Commonwealth does not appear to exercise a significant

measure of control over PRPA; Commonwealth law does not treat PRPA as an arm of the Commonwealth; and the Commonwealth's treasury is not at risk by a judgment against PRPA. That PRPA deals with Commonwealth rather than local concerns is not, when compared with the totality of the evidence, sufficient to negate this finding.

This determination is consistent with recent Commission decisions in Ceres Marine Terminals, Inc., 30 S.R.R. 358 (2004), and Carolina Marine Handling, Inc., 30 S.R.R. 1017 (2006). In Ceres, the Commission found that the Maryland Port Administration ("MPA") was entitled to immunity as an arm of the State of Maryland. MPA is a constituent unit of the Maryland Department of Transportation and is overseen by the Maryland Secretary of Transportation. Ceres Marine Terminals, Inc., 30 S.R.R. at 368. The Maryland General Assembly appropriates funds for the Maryland Department of Transportation and the MPA, and places such funds into the Transportation Trust Fund, which pays MPA's debt service and funds authorized transportation activities and projects. Id. MPA does not retain revenues generated from taxes, fees and charges, but instead, MPA remits such revenues to the trust fund. A judgment for damages against MPA would be satisfied from the Transportation Trust Fund; however it was found that MPA failed to meet its burden that a judgment would impact the Maryland Treasury. Id. at 368-69. Finally, at least one Maryland court has held that MPA was immune from suit in state court. Id. at 368. These factors supported the conclusion that the State of Maryland exercised a significant degree of control over MPA.

We also note that in Carolina Marine Handling, Inc., the Charleston Naval Complex Redevelopment Authority ("RDA") was found to be entitled to immunity. In that

decision, a majority of the Commission concluded that South Carolina exercises a high degree of control over RDA, RDA deals with issues of statewide importance, and South Carolina law treats RDA as an arm of the state. In reaching this conclusion, the majority noted that South Carolina law authorizes RDA to act as an agent of the state. It also noted that RDA's operations are subject to review by a legislative committee of the state legislature. Finally, with regard to risk to the state treasury, the majority concluded that an adjudication against RDA could impact South Carolina's revenues, as RDA would likely seek funds from the state for payment of a reparations award exceeding RDA's funds. Carolina Marine Handling, Inc., 30 S.R.R. at 1030-1035.

In contrast, PRPA's enabling statute indicates that PRPA was created with a legal existence and personality separate and apart from those of the Commonwealth. PRPA is not authorized by statute to act as an agent of the Commonwealth. PRPA's accounts are separate and apart from those of the Commonwealth. The Commonwealth is not liable for the debts and obligations of PRPA, and, therefore, the Commonwealth's treasury is not put at risk by a judgment against PRPA. Finally, numerous courts have held that PRPA is not entitled to immunity when acting as a marine terminal operator, as is alleged in these cases.

3. Golden Triangle and Regatta 2000

PRPA argues that it "is entitled to immunity for certain actions performed on behalf of the Commonwealth government." PRPA's Motion to Dismiss in Dkt. No. 04-01 at 38; see also PRPA's Motion for Summary Judgment in Dkt. No. 02-08 at 12-14 and 40-44; PRPA's Motion to Dismiss in Dkt. No. 04-06 at 6,8. These acts, PRPA alleges, include steps

taken in order to execute direct orders of the Governor in furtherance of the Golden Triangle and Regatta 2000 projects, which amount to PRPA acting as an agent of the Commonwealth. PRPA's Reply to Complainant's Opposition to Respondent's Motion to Dismiss in Dkt. No. 04-06 at 5 (PRPA was "acting as the agent of the Commonwealth's chief executive. . . ."); see also PRPA's Motion to Dismiss in Dkt. No. 04-01 at 13; PRPA's Motion for Summary Judgment in Dkt. No. 02-08 at 12-14 and 40-44; PRPA's Motion to Dismiss in Dkt. No. 04-06 at 6,8. The Governor's orders, PRPA argues, required certain adjustments in leasehold interests, including demolition of facilities which gave rise to some portions of the complaints in these proceedings.

PRPA correctly points out that entities that are not normally entitled to immunity can be immune when acting as an agent of the government. PRPA's Reply to Complainant's Opposition to Respondent's Motion to Dismiss in Dkt. No. 04-06 at 5 n.21, citing Shands Teaching Hospital and Clinics, Inc. v. Beech Street Co., 208 F.3d 1308, 1311 (11th Cir. 2000) (private health care administrator immune where adverse judgment could implicate state treasury); Scott v. O'Grady, 975 F.2d 366, 371 (7th Cir. 1993) (county sheriff entitled to immunity when acting as an arm of the state judicial system in executing a state warrant). See also, Boyle v. United Technologies Corp., 487 U.S. 500 (1988) (independent contractors may be entitled to immunity when performing work for the federal government); Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 19 (1940) ("[I]f [the] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing [the will of Congress].").

However, in this case, PRPA has failed to demonstrate that it is entitled to such immunity. PRPA's argument that it was acting on orders from the Governor and therefore entitled to immunity was soundly rejected in Trans-Caribbean Maritime Corp., 2002 PR App. Lexis 595. In Transcaribbean Maritime, Transcaribbean sued the Commonwealth alleging that the Commonwealth should be liable for a breach of contract committed by PRPA. The contract at issue was a lease between PRPA and Transcaribbean. Transcaribbean argued that the Commonwealth should be held liable because PRPA breached the contract in furtherance of an order of the Governor related to Regatta 2000. The Circuit Court of Appeals of Puerto Rico found that PRPA, in breaching the contract, acted in its capacity as the administrator of the ports and not as an agent of the Commonwealth. The facts of Transcaribbean Maritime are closely analogous to those alleged by PRPA in the instant proceedings. PRPA alleges that the complaints arise from actions undertaken when PRPA was acting as an agent of the Commonwealth pursuant to a direct order of the Governor in furtherance of the Golden Triangle and Regatta 2000 projects.

PRPA's position is unsustainable. PRPA has failed to meet its burden of demonstrating that it was acting as an agent of the Commonwealth. PRPA offers only two facts to support its agency relationship. First, PRPA relies on a keynote address given by the Hon. Pedro Rosello, Governor of Puerto Rico, delivered at Hilton Incentive and Meeting Management Summit, Caribe Hilton Hotel and Casino, in San Juan, Puerto Rico on November 18, 1998. In this speech, the Governor notes that PRPA will be engaged in the relocation of cargo operations to make room for cruise ship operations and a convention center. Second, PRPA offers deposition testimony indicating that in a meeting between the Governor and top

government officials, the Governor ordered PRPA to demolish certain maritime facilities in order to accommodate the Golden Triangle project. Deposition of Victor M. Carrion, former Chief of the Maritime Bureau of the Ports Authority, in Docket No. 02-08, dated June 5, 2003, at 68-72.

PRPA provides no evidence of a state law or a contractual obligation with the Commonwealth requiring PRPA to demolish warehouses or otherwise carry out the Governor's orders, and no direct evidence of any order at all. In fact, PRPA's enabling act provides that PRPA has "complete control and supervision" of all of its undertakings, 23 L.P.R.A. § 336(d), and, as we have determined, the Commonwealth does not exercise significant control over the operations of PRPA. Furthermore, as the Transcaribbean Maritime Court holds, PRPA's contractual obligations are undertaken based upon PRPA's own authorities and not as an agent of the Commonwealth. See Trans-Caribbean Maritime Corp., 2002 PR App. Lexis 595. PRPA's evidence is insufficient to sustain the existence of an agency relationship in the face of clear evidence that PRPA was created as an entity independent from the Commonwealth, as discussed supra.

Based on the foregoing, the Commission finds that PRPA has failed to meet its burden of demonstrating that there was an agency relationship between PRPA and the Commonwealth. Accordingly, we find that PRPA is not entitled to immunity for actions undertaken pursuant to an order of the Governor.

C. Status of Puerto Rico

Since we have determined that PRPA is not an arm of the Commonwealth, it is unnecessary to reach either the question of whether the Commonwealth is entitled to constitutional sovereign immunity, or whether the Puerto Rico Federal Relations Act would bar private complaints under the Shipping Act. Accordingly, we have determined not to rule upon constitutional or statutory immunity.

D. Procedural Issues

As noted supra, in response to Odyssea's February 15, 2005 reply memorandum, PRPA filed an Opposition to Odyssea's Petition to Show Cause, the Commonwealth filed a Response to Odyssea's Request for an Order to Show Cause, Intership filed a Motion to Strike, and both PRPA and the Commonwealth filed Oppositions to Intership's Motion to Strike. These pleadings were placed in the public docket and circulated to the Commission. Subsequently, at the oral argument held October 17, 2006, to consider the issue of whether PRPA is an arm of the Commonwealth, information contained in these pleadings was discussed by the Commission and counsel for the parties involved. The pleadings were treated by the Commission and the parties as though they were part of the record. In light of the Commission's treatment of these pleadings, a majority of the Commission (Commissioners Anderson, Brennan and Creel) accept them into the record.

Chairman Blust and Commissioner Dye would find that these filings are not authorized by the Commission's Rules of Practice and Procedure and would therefore reject them. Rule 74 expressly provides that a reply to a reply is not permitted.

46 C.F.R. § 502.74(a)(1). Similarly, they would not waive the procedural rules to accept these filings, as provided for in Rule 10. The authority to waive any of the Commission's Rules should only be invoked when such a waiver would not be inconsistent with those rules, and that is not the case here. 46 C.F.R. § 502.10. Moreover, Rule 10 provides for waiver in particular cases "to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires." 46 C.F.R. § 502.10. They believe none of these conditions exist here. Rather, it is their view that invoking the waiver procedure would cause significant harm to the Complainants, particularly Intership who has filed a motion to strike the offending filings. In any case, Chairman Blust and Commissioner Dye believe that the Commonwealth's views constitute legal argument and not evidence, and that their argument is substantially undermined by the Commonwealth's prior inconsistent statements submitted to the Circuit Court of Appeals of Puerto Rico in the Trans-Caribbean case.

IV. CONCLUSION

For the foregoing reasons, the Commission: grants the Commonwealth of Puerto Rico's Petition for Leave to File a Brief as an amicus curiae on the question of whether the Commonwealth is entitled to constitutional sovereign immunity; finds that PRPA is not an arm of the Commonwealth of Puerto Rico and is therefore not entitled to the protections of sovereign immunity; and finds that PRPA is also not entitled to sovereign immunity as an agent of the Commonwealth of Puerto Rico.

THEREFORE, IT IS ORDERED, that the above captioned proceedings are remanded to the Office of the Administrative Law Judge for further proceedings consistent with this Order.

By the Commission.

Bryant L. VanBrakle
Secretary

Concurring Opinion

Commissioner ANDERSON, concurring in the result.

While I concur in the conclusion that PRPA is not an arm of the Commonwealth of Puerto Rico, I believe that a statement included in a pleading filed by the Commonwealth should be addressed in reaching this conclusion. The statement is that the Commonwealth agrees that PRPA is an arm of the Commonwealth. As suggested by counsel for PRPA at the oral argument, this statement should be weighed with other relevant evidence in reaching a decision as to whether PRPA is entitled to immunity as an arm of the Commonwealth. Other relevant evidence includes PRPA's enabling statute, the treatment of PRPA under the law of Puerto Rico, and whether a judgment against PRPA would place the Commonwealth's treasury at risk.

Taken as a whole, PRPA's enabling statute establishes it as an entity with substantial independence from the Commonwealth: it provides that PRPA has a legal existence and personality separate from that of the Government of the Commonwealth; it has the power to sue and be sued; its debts, obligations and contracts are not considered to be those of the Commonwealth; it has complete control and supervision of its undertakings; and its funds are separate from those of the Commonwealth. In addition, local and federal case law indicate that PRPA is not an arm of the Commonwealth. Finally, as the Commonwealth is not liable for the debts and obligations of PRPA, it does not appear that the Commonwealth's treasury would be placed at risk by a judgment against PRPA. Weighed against this evidence, the Commonwealth's statement is not persuasive, especially when considered in light of its position in Trans-Caribbean, in which

it argued that PRPA does not operate in a governmental capacity when it engages in certain dock operating activities.

Dissenting Opinion

Commissioner BRENNAN and Commissioner CREEL, dissenting.

For the reasons set forth below, we find that the Puerto Rico Ports Authority ("PRPA") is an arm of the Commonwealth of Puerto Rico and is entitled to whatever privileges that status affords it in these proceedings before the FMC.

A. Ceres Analysis

Our analysis of arm-of-the-state status is conducted pursuant to the factors that the Commission established in Ceres Marine Terminals v. Maryland Port Administration, 30 S.R.R. 358 (2004), subsequent to the United States Supreme Court's decision in Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002). In Ceres, the Commission noted that the issue of whether the Maryland Port Administration is an arm of the state was a question of federal law and that the tests for determining that status varied among the circuits. Ceres at 366. The Commission then adopted and applied a two-part test focusing on: 1) the structure of the entity and 2) the risk to the state treasury. With respect to the structure of the entity, the Commission examined: 1) the degree of control that the state exercises over the entity; 2) whether the entity deals with local or statewide concerns; and 3) the manner in which state law treats the entity. Ceres at 368-370. In concluding that PRPA is an arm of the Commonwealth, we have considered all relevant facts within the Ceres framework. As in Ceres and Carolina Marine Handling v. South Carolina State Ports Authority, et al., 30 S.R.R. 1017 (2006), the Commission determines whether an

entity is an arm of the state based on all of the Ceres factors taken together. Id. at 1035. No one factor is controlling, and it is not necessary for all of the Ceres factors to be satisfied for an entity to be an arm of the state.

Control is the first element of the "structure" analysis of the Ceres test; that is, what degree of control does the state exercise over the entity? In the instant cases, the Commonwealth has created PRPA in such a manner that it exercises significant control over the Ports Authority. As a practical matter, the Governor of Puerto Rico controls PRPA's Board of Directors and therefore PRPA, because the Governor can remove 80% of the Board at any time as he or she sees fit.[1] The chairman of the Board of Directors is the Secretary of Transportation and Public Works. 23 L.P.R.A. § 334. Four of the five members of PRPA's Board of Directors are members of the Governor's cabinet[2] and serve at the governor's pleasure. Moreover, in practice, it appears that, on occasion, the Board has acted at the Governor's direction or control in certain policy matters.[3]

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[1]This degree of control was not present in Pastrana-Torres v. Corporación de Puerto Rico para la Difusión Pública, 460 F.3d 124 (1st Cir. 2006), the federal case cited by the majority opinion in its discussion of how Commonwealth law treats PRPA. Of eleven board members of the Public Broadcasting Corporation, only one was a cabinet member, eight were from the private sector, and all were appointed with the advice and consent of the Senate. There are other significant differences between PRPA and PBC, which we do not need to address here.

[2]23 L.P.R.A. § 334.

[3]Deposition of Victor M. Carrion, former Chief of the Maritime Bureau of the Ports Authority, in Docket No. 02-08, dated

Other facts also show significant Commonwealth control over PRPA. Each year, the Ports Authority must submit to the Governor and the Legislature a financial statement and complete report of its business for the preceding year. 23 L.P.R.A. § 345. In addition, PRPA must submit a complete report on the status and progress of all of its undertakings and activities since its last report. Id. The Secretary of the Treasury establishes PRPA's accounting system, in consultation with PRPA. 23 L.P.R.A. § 338.

The Controller of Puerto Rico must examine PRPA's books at least every three years, or as necessary, and report to PRPA's Board of Directors, the Governor, and the Legislature. Id. Moreover, the rates PRPA charges are subject to criteria established by the Legislature. 23 L.P.R.A. § 336(l). If PRPA's Board of Directors wishes to change the general rate structure immediately, it must file the rate regulations with the Department of State in accordance with statutory requirements and must hold a hearing within 30 days of the filing. 23 L.P.R.A. § 336(l)(1)(c).

As to *local vs. statewide concerns*, the second element of the Ceres "structure" analysis, the Puerto Rico Ports

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June 5, 2003, at 68-72 (stating that, in June 1998, Governor Pedro Rosseló summoned PRPA management and the heads of the Departments of Tourism, Transportation and Public Works, and Economic Development and told them, "I want everything torn down--all the facilities from Pier 8 to the Frontier Base."). Furthermore, the former general counsel and executive director of PRPA testified that the Board of Directors reports to the Governor of the Commonwealth. Deposition of Jose Guillermo Baquero, Vol. II, at 7-9 (Aug. 26, 2003).

Authority plainly deals with statewide, not merely local, concerns. The Authority is defined as a "public corporation and government instrumentality of the Commonwealth of Puerto Rico" (23 L.P.R.A. § 333(a)) and was created to develop, own, operate, and manage all air and marine transportation facilities and systems to and from the Commonwealth of Puerto Rico, for the purpose of promoting the general welfare and increasing commerce and prosperity. 23 L.P.R.A. § 336. As noted by the Commission in Carolina Marine, "ports in the United States . . . serve as vital gateways to international commerce, impacting the economies of their respective states." Carolina Marine at 1032. The economic importance of ports is even greater given the geographic nature of Puerto Rico; it is an isolated island commonwealth, with no roads, bridges, or tunnels connecting it to the U.S. mainland. All of Puerto Rico's imports and exports arrive or depart by sea or air and are subject to PRPA's jurisdiction or control.

The third "structure" element under Ceres is the manner in which state law treats the entity. Again, the balance of the facts indicates arm-of-the-state status. The Solicitor General of the Commonwealth of Puerto Rico unambiguously affirms that "the Commonwealth fully agrees that the Ports Authority is an arm of the Commonwealth." Commonwealth's Response to Odyssea's Request for an Order to Show Cause at 2, submitted by Salvador J. Antonetti-Stutts, Esq., Solicitor General, Department of Justice, Commonwealth of Puerto Rico on March 9, 2005. The Commonwealth also explicitly joins and supports PRPA's briefs, which argue in favor of finding that PRPA is an arm of the Commonwealth. Id. The Commonwealth further noted that it was doing so ". . . because the Commonwealth exercised a significant degree of control over the actions of the Ports Authority that are at issue in this

case. Id. at 6.

There are further facts relevant to how Commonwealth law treats the Ports Authority. For example, the Authority is specifically referenced by statute as a "*government controlled* corporation." 23 L.P.R.A. § 333(b) (emphasis added). It was set up as a "public corporation and government instrumentality" (23 L.P.R.A. § 333(a)) to serve the public welfare. 23 L.P.R.A. § 348 (PRPA established for "public purposes for the benefit of the people of Puerto Rico"). The harbors, waters, and public docks of Puerto Rico were placed under the control of PRPA and are to be administered by PRPA to benefit the people of Puerto Rico in the interest of navigation and commerce. 23 L.P.R.A. § 2202. Having the power of eminent domain,(23 L.P.R.A. § 336(h)), PRPA may, in coordination with the Commonwealth, acquire any property that the Board of Directors deems necessary and convenient for its purposes. 23 L.P.R.A. § 339. Also relevant to the structure analysis is the fact that, by law, no person having an economic interest in any private interest engaged in the transportation business may hold office on PRPA's Board of Directors or as an officer, employee, or agent of the Puerto Rico Ports Authority. 23 L.P.R.A. §§ 334, 337(b).

Moreover, PRPA deposits its funds in qualified depositories for funds of the Government of Puerto Rico, even if such funds are kept in separate accounts in the name of PRPA. 23 L.P.R.A. § 338. PRPA is exempt from state taxes. 23 L.P.R.A.§ 348. It must pay $400,000 into the Commonwealth Treasury annually, but only if such funds are available. 23 L.P.R.A. § 354. PRPA is also exempt from all fees, taxes, and imposts relating to judicial proceedings, governmental certifications, and the execution and registration of public documents in Puerto Rico. 23 L.P.R.A. § 348. These

numerous facts indicate that Commonwealth law treats PRPA as an arm of the Commonwealth.

With respect to the second part of the Ceres analysis, whether a judgment against PRPA would implicate the treasury of the Commonwealth, we agree with the majority that PRPA has not met its burden. As noted in Ceres and Carolina Marine, however, this is hardly a fatal flaw to reaching a determination here that PRPA is an arm of the Commonwealth.

In conducting our Ceres analysis, we are mindful that the United States Supreme Court, in considering the application of sovereign immunity to proceedings before federal administrative agencies, has emphasized protecting the dignity of the sovereign. The governmental/proprietary analysis of Royal Caribbean Corp. v. Puerto Rico Ports Authority, 973 F.2d 8 (1st Cir. 1992), played no part in the Supreme Court's analysis in Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002), the 2002 case that markedly changed the landscape for sovereign immunity issues, and which the Commission took into account in formulating its Ceres test in 2004. In South Carolina Ports Authority, the Supreme Court held that state sovereign immunity precluded the Federal Maritime Commission from adjudicating a private-party complaint alleging that a state-run port had violated the Shipping Act.

"The preeminent purpose of state sovereign immunity," the Court declared, "is to accord States the dignity that is consistent with their status as sovereign entities." 535 U.S. at 760. In this regard, the Court further stated, "simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of

private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC." Id. In the proceedings currently before us, the sovereign agrees with PRPA and maintains that PRPA is an arm of the Commonwealth. We believe that for the Commission to conclude otherwise would be a significant affront to the sovereign's dignity.

Under the two-part Ceres test, the focus is properly on the entity's structure and the financial risk to the state. The particular complained-of conduct is relevant only to the extent that it is probative of structure or financial risk. In this regard, once it is decided that an entity is an arm of the state, we believe that the entity is an arm of the state for all purposes. In Royal Caribbean Corp. v. Puerto Rico Ports Authority, 973 F.2d 8 (1st Cir. 1992), the Court of Appeals for the First Circuit declined to find that PRPA, when operating and maintaining docks, was an arm of the Commonwealth. The Court relied, in part, on the fact that PRPA's marine terminal activities (specifically, the allegedly negligent maintenance of a pier) were proprietary rather than governmental in nature. While Royal Caribbean[4] did look at several factors used in the Ceres analysis, the Court was also persuaded to a large degree by a "proprietary vs. governmental" distinction which is not part of the Commission's Ceres test and which became incorrect following the Supreme Court's emphasis on state dignity in its 2002 ruling in South Carolina Ports Authority.[5]

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[4]By citing federal cases such as Royal Caribbean for the purpose of establishing, in part, how state (or Commonwealth) law treats the entity, the majority departs from the Ceres test.

[5]Two years earlier, the 1st Circuit found that PRPA was an arm of the Commonwealth and entitled to 11th Amendment

We accord Transcaribbean Maritime Corp. v. Commonwealth of Puerto Rico, 2002 PR App. LEXIS 595 (March 27, 2002) much less weight than does the majority in the analysis of how Commonwealth law treats PRPA. In the first place, Transcaribbean was issued not by the Commonwealth's highest court, but by an intermediate court, the Circuit Court of Appeals of Puerto Rico. Furthermore, the court did not directly address Eleventh Amendment sovereign immunity. The issue before it was a simple breach of contract claim brought by a lessee, Transcaribbean, against the Commonwealth and PRPA The court dismissed the Commonwealth from the proceeding pursuant to 23 L.P.R.A. § 2303(b)[6] not only because the relevant dock operations of PRPA were held to be proprietary, rather than governmental, in nature, but more fundamentally because the complaint failed to "state facts which attribute any specific negligent act whatsoever to the Administrator, nor to any of the employees of the Authority." Transcaribbean at 7. In this context, the holding in Transcaribbean is narrow and not indicative of a Commonwealth viewpoint that PRPA is not arm of the Commonwealth with regard to claims of constitutional sovereign immunity.

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immunity. Puerto Rico Ports Authority v. M/V Manhattan Prince, et al., 897 F.2d 1 (1st Cir 1990). In that case, which was a tort action alleging negligence by a PRPA-licensed harbor pilot, the court concluded that PRPA's licensing of the harbor pilot was not a proprietary function, but rather a governmental one, exercised by it as an arm of the Commonwealth.

[6]The plaintiff, Transcaribbean Maritime Corp., also based its claim on the Federal Civil Rights Act, 42 U.S.C. § 1983, the Civil Rights Act of Puerto Rico, 1 L.P.R.A. §§ 13-18, and the Shipping Act of 1984. Transcaribbean at 2.

B. Prior Commission Applications of the Ceres Analysis

It appears that the factors in this proceeding weigh at least as strongly in favor of arm-of-the-state status as those of Ceres and Carolina Marine. We also note that the types of activities that are the gravamen of the complaints in the instant proceedings--the leasing of marine terminal facilities--are exactly the same kinds of activities that were subject to review in Ceres and Carolina Marine. In Ceres, the Commission concluded that MPA had not proven that any judgment against it would be paid from state funds and still found it to be an arm of the state. As for the degree of control, the Commission noted that the indicators were mixed, but nonetheless concluded that Maryland exercises significant control over MPA. The Commission further noted that "the provenance of the officials who run MPA suggests that they are political appointees who are compensated by the state and are intended to be answerable to the state." Ceres at 369. The Commission next concluded that MPA exercised authority over statewide concerns and that its oversight of maritime commerce is an essential function to the state of Maryland. As for the remaining issue, how state law treats MPA, the Commission merely noted that one local court had held MPA immune from suit in state court.

In Carolina Marine, the Commission had another opportunity to determine whether certain entities were arms of the state. The Commission affirmed the ALJ's dismissal of South Carolina State Ports Authority ("SCSPA") as a party to the proceeding, relying on the prior determination that SCSPA is an arm of the state of South Carolina.[7] The Commission

[7]Citing Ristow v. South Carolina Ports Auth., 58 F.3d 1051

then considered whether the Charleston Naval Complex Redevelopment Authority ("RDA") is an arm of the state of South Carolina under the Ceres test. It ultimately concluded that RDA is an arm of the state.

As for degree of control, the Commission noted that: 1) RDA had authority to carry out redevelopment projects and to act as an agent for the state; 2) two of RDA's nine members are representatives of the state and that the others are appointed with the advice and consent of the S.C. Senate; 3) RDA could dissolve itself by a 2/3 vote; 4) RDA members must comply with a state ethics act; 5) RDA must comply with the South Carolina procurement code; and 6) RDA's operations were reviewed by a special legislative committee. After reviewing RDA's legislative mandate, the Commission concluded that RDA deals with statewide concerns. The Commission noted that "ports in the U.S. serve as vital gateways to international commerce, impacting the economies of their respective states." Carolina Marine at 1032.

Turning to the manner in which state law treats RDA, the Commission noted that RDA's enabling act stated that it is " a public body, corporate and politic, exercising public and essential governmental powers . . . ." Carolina Marine at 1033. RDA is an agency of South Carolina under the South Carolina Torts Claims Act. RDA is also the sole representative of the state in negotiating with the federal government. Lastly, the Commission noted that RDA must provide notice of its meetings to the media and public. The Commission also found that a judgment against RDA might impinge on the state fisc. It noted that RDA would likely seek funds from South

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(4th Cir. 1995).

Carolina for payment of a reparations award exceeding its existing funds.

Of course, the Commission does not need to find a risk to the treasury in order to find that PRPA is an arm of the state. In South Carolina State Ports Authority, in response to the United States' argument that actions before the FMC do not implicate the financial integrity of states, the Court noted:

> This argument . . . reflects a fundamental misunderstanding of purposes of sovereign immunity. While state sovereign immunity serves the important function of shielding state treasuries and thus preserving 'the States' ability to govern in accordance with the will of their citizens,' the doctrine's central purpose is to 'accord the States the respect owed them as joint sovereigns.' 535 U.S. at 765 (citations omitted).[8]

Furthermore, in Ceres itself, the Commission found *no* risk to Maryland's treasury and still determined that the Maryland Port Administration was an arm of the state.

C. Sovereign's Views

A majority of the Commissioners accepts the clear statement of the Commonwealth that it considers PRPA to be an arm of the Commonwealth. Majority Opinion at 29. The Commonwealth's filing came into the record as follows. On

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[8]The Supreme Court did not address whether SCSPA was an arm of the State of South Carolina, but simply affirmed the judgment of the Court of Appeals.

February 15, 2005, Odyssea filed a Reply Memorandum in response to the Commission's Order of November 22, 2004 ("Odyssea Reply"). In this document, Odyssea first noted that the Office of the Solicitor General of the Commonwealth of Puerto Rico had filed a petition to file an *amicus curiae* brief in that proceeding. Odyssea then stated that it ". . . does not object to the receipt and consideration of the submission by the Commonwealth of Puerto Rico. It is the position of Odyssea that the involvement of the Commonwealth in these proceedings is long overdue." Odyssea Reply at 2. Odyssea further stated that, "since the Commonwealth has now appeared and inserted itself in these proceedings, the matter is ripe for an *order to show cause*[9] to be issued to BOTH the Solicitor General and counsel to PRPA."[10] In its prayer for relief, therefore, Odyssea asked the Commission to issue such an order.[11]

In response to Odyssea's petition requesting that the Commission issue a show cause order, PRPA filed an "Opposition to Odyssea's Petition for a Show Cause Order" on March 2, 2005. In addition, on March 9, 2005, the Commonwealth of Puerto Rico filed a "Response to Odyssea's Request for an Order to Show Cause." In its response, the Commonwealth's Solicitor General made the following representations on behalf of the Commonwealth: ". . . the Commonwealth has allowed the Ports Authority to characterize itself as an arm of the Commonwealth because the Commonwealth fully agrees that the Ports Authority *is* an arm

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[9] Odyssea Reply at 2 (emphasis added).

[10] Id. (emphasis in original).

[11] Id. at 17.

of the Commonwealth." Response to Odyssea's Request for an Order to Show Cause at 2 (emphasis in original). The Commonwealth further explained that the reason it had not expressed itself sooner on this issue was because it had not been asked to do so. Id.

Here, the key issue before us is whether the Commission might offend the dignity of a sovereign, the Commonwealth of Puerto Rico, by entertaining private-party complaints against it or one of its arms or constituent entities. In this regard, the view of the sovereign on the issue of whether PRPA is an arm of the Commonwealth takes on particular significance. We agree with the Commission minority in Carolina Marine that the views of the sovereign should be considered, if available, in making our determination. Carolina Marine at 1040 (pointing out that "South Carolina has remained silent on whether it intended to confer arm of state status on RDA") and at 1041 (noting that "nowhere in the record does RDA convincingly show on its own behalf that South Carolina characterizes or treats RDA as a state agency with arm of the state status"). In the instant case, we have a clear statement on behalf of the Commonwealth of Puerto Rico that it considers PRPA to be an arm of the Commonwealth for all purposes. We should accord views due deference.

D. Conclusion

Based on the foregoing, we believe that the facts relating to control, statewide concerns, and state-law treatment of the entity establish that the Puerto Rico Ports Authority is an arm of the Commonwealth of Puerto Rico. In conducting an arm-of-the-state analysis, there is no reason to give each factor equal weight. In fact, some factors will obviously be of

greater importance. For example, in the instant case, the legislature created PRPA to oversee the maritime and air transportation systems for an island commonwealth of four million people. The fact that Puerto Rico is an island makes the statewide, economic significance of the Ports Authority especially clear, and more important than it might be in certain mainland jurisdictions. We also find it particularly significant that four out of the five members of PRPA's Board of Directors are members of the Governor's cabinet and serve at his or her pleasure. Lastly, the Solicitor General has stated, on behalf of Puerto Rico, that it believes that PRPA is an arm of the Commonwealth of Puerto Rico.

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